IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

IN RE:)
)
CHARLES WEITZMAN,) Bankruptcy Case No. 98-33550
)
Debtor.)
_____________________________________)
)
MELVIN RIPPERDA, Individually and)
as Settlor of the Melvin Ripperda)
Irrevocable Trust, and)
JANET RIPPERDA,)
)
Plaintiffs,)
)
vs.) Adversary Case No. 99-3013
)
CHARLES WEITZMAN, Individually,)
and CHARLES WEITZMAN, as Trustee)
of the Melvin Ripperda Irrevocable Trust,)
and CHARLES I. WEITZMAN, P.C.,)
)
Defendants.)

OPINION

This matter having come before the Court on a Motion for New Trial filed by Defendant, Charles I. Weitzman, on June 24, 1999; the Court, having heard arguments of the parties and being otherwise fully advised in the premises, makes the following findings of fact and conclusions of law pursuant to Rule 7052 of the Federal Rules of Bankruptcy Procedure.

A trial was held in this matter on June 14, 1999. At the conclusion of trial, the Court made its findings of fact and conclusions of law pursuant to Rule 7052 on the record. The Court concluded that, based upon the testimonial and documentary evidence submitted by the Plaintiffs, the indebtedness owed to Plaintiffs by the Defendant was non-dischargeable under 11 U.S.C. §§ 523(a)(2)(A), 523(a)(4), and 523(a)(6). In addition to finding that the Plaintiffs had met their burden of proof under the enumerated sections of 11 U.S.C. § 523. The Court stated:

> I find that, based on his demeanor, on his appearance, what he said, how he said it, how what he said related to the testimony of the other witness, and how what he said related to the exhibits that were offered into evidence, I find that the Defendant in this case, the Debtor, is not a credible witness. Based upon all those factors, he is not a credible witness.

The Court further stated:

> Aside from not being credible, the Defendant testified that I believe that he was disbarred on consent, and it was partly because of the money and the Plaintiffs' trust account or the money that wasn't in the Plaintiffs' trust account. He took the Fifth Amendment on other questions relating to that account. So I have no doubt the Defendant has no credibility - was not a credible witness on his own behalf.

In the instant Motion for New Trial, the Defendant not only requests a new trial as to Plaintiff, Melvin Ripperda, but he also requests that the Court vacate the judgment as to Janet Ripperda in its entirety. The Defendant further alleges that the Plaintiff failed to establish, by a preponderance of the evidence, the existence of a debt in the amount alleged; the Plaintiff failed to prove fraud or defalcation by a preponderance of evidence; the Plaintiff failed to prove embezzlement by a preponderance of the evidence; the Plaintiff failed to prove conversion by a preponderance of the evidence; and the Court erroneously found the Defendant was not a credible witness. Based upon these assertions, the Defendant believes that he was denied a fair trial.

A hearing was held on the Defendant's Motion for New Trial on July 12, 1999, at which time the parties, including the Defendant, were given an opportunity to argue the Motion. At hearing, the Defendant added little, if anything, to the assertions made in the Motion other than a continued request to have the judgment vacated as to Plaintiff, Janet Ripperda, and that he be granted a new trial as to Plaintiff, Melvin Ripperda. The Defendant also argued that the indebtedness, in the amount of $250,000, which was declared non-dischargeable, was excessive in light of the evidence presented at trial.

In reviewing the record of trial held on June 14, 1999, the Court must conclude that the evidence presented, both testimonial and documentary, clearly supports the Court's finding of non-dischargeability under 11 U.S.C. § 523(a)(2)(A). In order to establish non-dischargeability of a debt under 11 U.S.C. § 523(a)(2)(A), a creditor must prove: (1) that the debtor made a material false representation; (2) that the debtor knew the representation was false when he or she made it, or made the representation with such reckless disregard for the truth as to constitute a willful misrepresentation; (3) that the debtor made the false representation with the intention and purpose of deceiving the creditor; (4) that the creditor justifiably relied on the false representation; and (5) that the creditor sustained damages as a proximate result of the justifiable reliance on the false representation. <u>See</u>: <u>In re Meyer</u>, 51 F.3d 670 (7th Cir. 1995); and <u>Field v. Manns</u>, 516 U.S. 59 (1995). The record of trial clearly establishes that the Plaintiff, Melvin Ripperda, placed funds in excess of $450,000 in a trust, of which he was the settlor and the Defendant was the trustee, in January 1987, pursuant to the terms of a document entitled "Melvin Ripperda Irrevocable Trust Agreement." The evidence also clearly establishes that the Debtor/Defendant held himself out as an individual experienced in handling such a trust and experienced in being competent in investing the funds of said trust. The evidence further establishes that, between January 1987 until February 1993, monthly payments were made from the trust to Plaintiff, Melvin Ripperda, and that trust funds were also used to pay expenses of Melvin Ripperda, including the purchase of a home. After February 1993, however, the payments to Melvin Ripperda dried up and the record clearly reflects that only a few further payments were made to Plaintiff, Melvin Ripperda, and that those payments were only made after much pressure from the Plaintiff on the Defendant, including trips to the Defendant's home, wherein the Plaintiff sought an explanation as to the whereabouts of his trust funds. The record also reflects that the last report made by the Debtor/Defendant to the Plaintiff concerning the funds in the trust was approximately January 13, 1993, at which time Defendant reported to Plaintiff that the trust had a value of $227,194.81. The record also reflects that all of the funds in the trust disappeared and that the Debtor/Defendant has offered absolutely no credible explanation as to what occurred with the funds. The Court further notes that the Debtor/Defendant has admitted that he was disbarred upon consent as an attorney at law, based at least partly on the disappearance of the funds in the Melvin Ripperda Irrevocable Trust. All in all, the Court finds that the record clearly establishes that the Debtor/Defendant committed a fraud upon Plaintiff, Melvin Ripperda, as that term is defined under 11 U.S.C. § 523(a)(2)(A). As such, the Plaintiff has established, by a preponderance of the evidence, a claim for non-dischargeability of the debt at issue. See: Grogan v. Garner, 498 U.S. 279 (1991).

Under 11 U.S.C. § 523(a)(4):

> (a) A discharge under section 727, 1141, 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual debtor from any debt -
>
> > (4) for fraud or defalcation while acting in a fiduciary capacity, embezzlement, or larceny;

The facts clearly established in the record of this case support the conclusion that the Debtor/Defendant was acting in a fiduciary capacity as trustee of the Melvin Ripperda Irrevocable Trust Agreement, of which the Plaintiff, Melvin Ripperda, was the settlor. Three requirements must be satisfied for a debt to be excepted from discharge as one arising from a debtor's fraud or defalcation while acting in a fiduciary capacity: (1) there must be an express trust existing between the parties; (2) the debt must have been caused by fraud or defalcation; and (3) the debtor must have acted as a fiduciary to the creditor at the time that the debt was created. See: In re Hodges, 115 B.R. 152 (Bankr. S.D. Ill. 1990); and In re Marchiando, 13 F.3d 1111 (7th Cir. 1994). In re-examining the record of trial in this matter and in considering both the testimonial and documentary evidence adduced at trial, the Court has absolutely no difficulty in finding that the Plaintiff, Melvin Ripperda, has established non-dischargeability under 11 U.S.C. § 523(a)(4), by a preponderance of the evidence. There was clearly an express trust in this matter between the Plaintiff and the Debtor/Defendant. The Debtor/Defendant was clearly acting in a fiduciary capacity, and the funds in the trust have, without question, disappeared with absolutely no explanation from the Debtor/Defendant as to how the funds disappeared or as to the whereabouts of the funds at the present time. While fraudulent intent and fraudulent conduct are rarely proven by direct evidence, there is a universal proposition of law that fraudulent intent and fraudulent conduct may be inferred from the circumstances. Under the circumstances of the instant case, the Court has no difficulty in finding that the Debtor/Defendant acted in a fraudulent manner while in a fiduciary capacity to Plaintiff, Melvin Ripperda, and that the debt in question was created as a result of that fraud.

Pursuant to 11 U.S.C. § 523(a)(6), a debt is non-dischargeable under Chapter 7 of the Bankruptcy Code where it can be found that the debt was for willful and malicious injury by the debtor to another entity or to the property of another entity. Under § 523(a)(6), a plaintiff must prove: (1) that there was a willful and malicious act on the part of the debtor; (2) done without just cause or excuse; (3) which leads to harm to another entity or property of another entity. In re Hallahan, 78 B.R. 547, at 550 (Bankr. C.D. Ill. 1987).

While there is no universally accepted definition of the terms "willful" and "malicious," the majority of courts have concluded that willful and malicious conduct is a deliberate or intentional act of a debtor having knowledge that the act could harm another. In re Roemer, 76 B.R. 126 (Bankr. S.D. Ill. 1987); In re Nelson, 35 B.R. 766 (Bankr. N.D. Ill. 1983). The term "malicious" has been defined as a wrongful act done consciously and knowingly in the absence of just cause or excuse. In re Bossard, 74 B.R. 730 (Bankr. N.D. N.Y. 1987); In re Condict, 71 B.R. 485 (Bankr. N.D. Ill. 1987). It is not necessary for the debtor to act with ill will or malevolence toward the injured party. In re Gabbler, 88 B.R. 62 (Bankr. E.D. Pa. 1988). It has been held that a conversion of the property of another is actionable under § 523(a)(6), and that the phrase "willful and malicious injury" includes a willful and malicious conversion. In re Meyer, 7 B.R. 932, at 933 (Bankr. N.D. Ill. 1981). Under Illinois law, the essence of an action for conversion is the wrongful deprivation of property from a person entitled to possession. Glaser v. Kazak, 173 Ill.App.3d 108, 527 N.E.2d 379 (1988). In this case, the evidence clearly established that the Debtor/Defendant wrongfully deprived Plaintiff, Melvin Ripperda, of the proceeds from the subject trust account in the amount of at least $227,194.81, which is the value of the trust as stated in the last report given to the Plaintiff, on or about January 13, 1993. The simple fact is that the money is gone and there has been not only no credible explanation of where the money went. From this, the Court can only conclude that the Debtor/Defendant was responsible for the disappearance of the money in the trust. Such disappearance clearly constitutes a conversion, thus making the indebtedness non-dischargeable under § 523(a)(6).

In examining the Debtor/Defendant's Motion for New Trial, the Court does find that there are two valid points which are raised therein. First, the Court notes that, although it entered judgment in favor of both Plaintiffs in this case, upon further review of the evidence submitted, the Court finds that judgment should only be entered in favor of Plaintiff, Melvin Ripperda, as he is the sole beneficiary of the trust in question and the only signatory on that trust agreement as the settlor of the trust. Second, the Court notes that it found indebtedness in the amount of $250,000 to be non-dischargeable. Further review of the evidence indicates that the amount to be found non-dischargeable should be $227,194.81.

ENTERED: July 21, 1999

/s/ Gerald D. Fines
United States Bankruptcy Judge